

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

76-5041

To be argued by
BERNARD GARTLIR

ON MAIL

In The

United States Court of Appeals

For The Second Circuit

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P/S

In the Matter of

Robert A. Martin a/k/a R. Allan Martin a/k/a Robert Allan
Martin,

Bankrupt-Appellant.

*Appeal From the United States District Court For the Southern
District of New York, Honorable Edmund L. Palmieri, District
Judge*

REPLY BRIEF
FOR BANKRUPT-APPELLANT
ROBERT A. MARTIN

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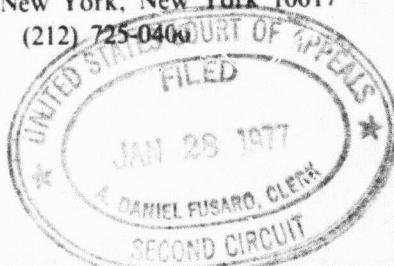


TABLE OF CONTENTS

	<i>Page</i>
Argument:	
Points:	
I. The bankrupt should not be penalized when his personal records are lost through no fault of his own.	1
II. The bankrupt should not be denied his discharge when his corporation continued to record his personal transactions even after it ceased doing business with the public.	3
Conclusion	5

TABLE OF CITATIONS

	<i>Page</i>
Case Cited:	
In re Muss, 100 F.2d 395 (2d Cir. 1938)	4

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**REPLY BRIEF FOR BANKRUPT-APPELLANT
ROBERT A. MARTIN**

The purpose of this reply memorandum is to respond to the
allegations of fact and law made by the trustee in his brief.

ARGUMENT

Point I

**The bankrupt should not be penalized when his personal
records are lost through no fault of his own.**

In his brief the trustee seeks to transform a responsible act
by the bankrupt — the delivery of his records to a warehouse for
shipment to the trustee — into a misdeed for which the bankrupt
should be denied his discharge. The trustee uses two tactics to
accomplish this end: (1) repeatedly emphasizing the high dollar
value of the transactions which the bankrupt contends could be
explained by the missing records; (2) stating that the bankrupt's

only explanation for several large checks was to refer to the missing personal records.

First, by repeatedly emphasizing in his Statement of Facts the large sums for which there allegedly is no explanation, the trustee seeks to imply that the missing records would not offer sufficient clarification. It must be emphasized, however, that the missing checkbook stubs covered more than three years in the life of a substantial and active investor in the stock market. It is not surprising, therefore, that large sums of money were involved, but the fact that the transactions were on a high scale in no way diminishes the likelihood that they were recorded in the bankrupt's checkbook.

Second, the trustee contends that the bankrupt could not explain the purpose of several checks, one of which he allegedly cashed, other than to refer to his missing personal records (Trustee's Brief, pp. 7-8). As for the allegation iterated below and repeated here that the bankrupt cashed any of these checks, there is simply no proof that this ever occurred. A personal endorsement on the back of a check drawn to cash or the order of the bankrupt does not mean the check was cashed — it was deposited. More important, it is absolutely untrue that the bankrupt had no explanation for these items. For when asked to explain the nature or purpose of the two checks referred to by the trustee in his brief, which were for the sums of \$14,670.60 and \$32,142.55, the bankrupt replied that these were funds "which were transferred from one bank in the exact amount to another to be used for a security purchase . . ." (253a).

It is certainly a fair inference from the odd amounts of the checks that they were indeed used for the purpose of buying stock as the bankrupt contends. Moreover, the bankrupt's explanation is given even stronger support by the fact that the large majority of the unidentified checks were to members of the New York Stock Exchange. Thus, we now have two instances where the trustee, by emphasizing these checks and implying

impropriety, seeks to distort the bankrupt's actions. First, by stressing the large scale of the bankrupt's transactions the trustee suggests that the bankrupt is somehow responsible for the loss of his records and that the records themselves are insufficient. Second, by emphasizing that the bankrupt relied heavily on his personal checkbook stubs, the trustee seeks to obscure the fact that the bankrupt gave perfectly credible explanations for the checks he was questioned about at the hearing.

Point II

The bankrupt should not be denied his discharge when his corporation continued to record his personal transactions even after it ceased doing business with the public.

In Point II of his brief, the trustee contends that the bankrupt's corporate records were insufficient substitutes for his missing personal records. The basis for this contention, as well as for the admittedly similar conclusions of the Referee and District Court, is that corporate records cannot be used for the period after which the corporation was "out of business."

This chronological argument completely misconstrues the purpose and activities of Robert A. Martin Associates, the bankrupt's personal corporation. From its inception the primary purpose of the corporation had been to serve as a vehicle for the bankrupt, as President and holder of 80% of the equity of Robert A. Martin Associates (1) conducted much of his extensive personal trading account through the corporation (196a); (2) had his corporation's general ledger record *all* the purchases and sales that he made (212a) as well as all his dealings with the corporation (221a).

When Robert A. Martin Associates went "out of business" in late 1962, this represented a termination of *only its dealings with the public* (227a). As the following exchange between the

trustee's counsel and the bankrupt indicates, the corporation continued to serve as a ledger of the bankrupt's personal dealings even after it ceased to be a thriving operation in its own right:

"Q. How much, sir, did you give to the Corporation either by way of loan or investment during the year 1963? A. I could not say without checking the books of Robert A. Martin Associates Inc., not accurately." (239a).

Moreover, even if the corporate records could not be used as substitutes for the period after its liquidation in later 1962 or early 1963, it must be re-emphasized that the post-1962 transactions comprised only a *small* fraction of the bankrupt's dealings. Specifically, the Referee's own chart indicates that over 93% of Mr. Martin's pre-bankruptcy deposits and withdrawals occurred before 1963 and thus during a period in which his corporation was fully operative (349a).

It is true that corporate records cannot be substituted for missing personal records where the bankrupt engaged in *substantial* business not reflected on the corporate books. *In re Muss*, 100 F.2d 395 (2d Cir. 1938). Clearly, however, it is inappropriate to apply that rule of law, derived from a case where *two-thirds* of the bankrupt's transactions were not recorded on the corporate books to this case. Here, the overwhelming majority of the bankrupt's transactions were recorded on his corporate ledger — the very record which was ignored by the trustee and which today still remains in the trustee's accountant's possession available for inspection.

CONCLUSION

We respectfully urge that the order of the District Court be reversed.

Respectfully submitted,

**HOFHEIMER GARTLIR
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Attorneys for Appellant

BERNARD GARTLIR
Of Counsel

A 202 Affidavit of Personal Service of Papers
FEDERAL COURT
SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

In the Matter of
ROBERT A. MARTIN,
Bankrupt-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 28th day of January 1977 at 425 Park Avenue
New York, N.Y.

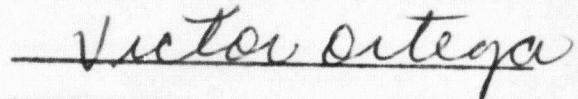
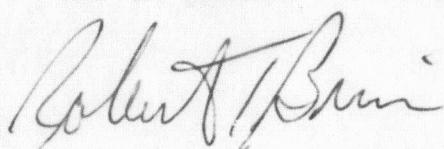
deponent served the annexed

Reply Brief

upon
Finley Kumble Heine, Underbaerg &
Grutman, Esqs.

the in this action by delivering true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 28th
day of January, 19 77



VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

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